

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KEYSTONE FRUIT MARKETING,
INC., and BOB N. EVANS,

Plaintiffs,

v.

WILLIAM G. BROWNFIELD and
JANET H. BROWNFIELD,

Defendants and Cross-
Plaintiffs.

NO. CV-05-5087-RHW

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Plaintiffs brought the above-captioned cause of action against two former employees, Defendant William G. Brownfield and Janet Clayton.¹ Plaintiffs are asking the Court to find that Defendant Brownfield breached his duty of loyalty and unlawfully interfered with Keystone Fruit Marketing's business relationship or expectancy with Grigg and Sons.² Plaintiffs are seeking community liability on the

¹The claims against Janet Clayton have been resolved and she is no longer a party to this action (Ct. Rec. 331).

²The Court granted summary judgment in favor of Janet Clayton with respect to the claims of tortious interference and breach of duty of loyalty. (Ct. Rec. 219). Plaintiffs also alleged that Defendant William G. Brownfield and Janet Clayton breached the employee handbook to which they agreed to be bound. The Court found that the employee handbook was not a contract, but a "guideline" describing company policies. The Court granted summary judgment in favor of Defendants on this claim and also granted summary judgment in favor of

1 part of Defendant Janet Brownfield. Plaintiffs also alleged violations of the
2 Computer Fraud and Abuse Act and the Uniform Trade Secrets Act.³

3 Plaintiffs seek repayment of the wages paid to Defendant Brownfield during
4 the period of alleged disloyalty while he was employed by the company and also
5 seek lost profits from its relationship with Grigg and Sons. The Brownfield
6 Defendants counterclaimed against Plaintiff Keystone Fruit Marketing, Inc. for
7 amounts due under the employment agreement.⁴

8 A bench trial was held on February 4-7, 2008, in Richland, Washington.
9

10 Defendant Brownfield on the covenant-not-to-compete claim. Plaintiff Bob Evans
11 also sought to have the Court order Defendant Brownfield to repay the six
12 promissory notes. The Court granted summary judgment in favor of Plaintiff
13 Evans on this claim and judgment was entered against Defendants William and
14 Janet Brownfield on March 14, 2007 (Ct. Rec. 294).

15 ³Previously, the Court granted summary judgment in favor of Defendant
16 Janet Clayton on Count 1, which alleged that she violated 18 U.S.C. §
17 1030(a)(2)(c) by sending e-mails with an attachment containing
18 “Billscustomerlist.xls.” (Ct. Rec. 219). The Court also concluded that “Copy of
19 WWForecasts.xls” and “WALLA WALLA PRICING 2005.xls” were trade secrets
20 as a matter of law. *Id.* On February 1, 2008, the arbitrator of a related case
21 involving third-party defendant Walla Walla Keystone, LLC. made a final award
22 of computer forensic costs. These costs were the only damages claimed from
23 KFM’s claim for violations of the Uniform Trade Secrets Act and the Computer
24 Fraud and Abuse Act. Accordingly, these claims do not remain as independent
25 claims. *See* Ct. Rec. 376.

26 ⁴The Court granted summary judgment in favor of Plaintiffs on the
27 Brownfield Defendants’ counterclaims for bonuses allegedly owed for the fiscal
28 years 2003, 2004, and 2005 (Ct. Recs. 363, 368).

1 Plaintiffs were represented by George Ahrend and William Gilbert. Defendants
2 were represented by John Schultz. Having fully reviewed all the materials
3 submitted by the parties and the record in this matter, the Court enters the
4 following Findings of Fact and Conclusions of Law.

5 **FINDINGS OF FACT**

6 The testimony presented to the Court was in direct conflict. Defendants'
7 case relies on the credibility of Defendant William Brownfield and Lorin Sr. and
8 Lorin Jr. Griggs. Plaintiffs rely on admissions by the Griggs and Brownfield,
9 along with circumstantial evidence in support of their assertions that Defendant
10 Brownfield violated his duty of loyalty and tortiously interfered with its business
11 expectancy. The Court finds the circumstantial evidence and the sum of the
12 admissions as presented by Plaintiffs to be more probative of what happened in the
13 course of dealings between Keystone Fruit Marketing, Inc., Defendant William
14 Brownfield and Grigg and Sons.

15 The Court makes the following Findings of Fact:

16 Plaintiff Keystone Fruit Marketing, Inc. (KFM) is a Pennsylvania business
17 corporation that markets and sells a variety of produce worldwide. KFM began in
18 1977 as marketers of apples and peaches from Pennsylvania, North Carolina,
19 Georgia and New York. Currently, KFM's largest commodity is onions from
20 Vidalia, Georgia, Peru, and Mexico. KFM has developed a year-round onion
21 program by using different regions to produce onions. Based on the Red and Blue
22 Book, KFM has the highest rating for business character in the market. Plaintiff
23 Bob Evans is a shareholder, officer, and director of KFM.

24 Defendant William Brownfield began working as the Sales Manager of the
25 Northwest Office of KFM on April 23, 1996.⁵ He initially began working out of

27 ⁵Defendant Brownfield's conduct was on behalf of the marital community
28 composed of him and his wife, Janet Brownfield.

1 his home in Richland, Washington; eventually the office was relocated to Walla
2 Walla, Washington. Prior to being hired by KFM, Defendant Brownfield owned
3 his own marketing business and sold Grigg and Sons onions. By all accounts,
4 Defendant William Brownfield was a successful onion salesman.

5 Nevertheless, throughout his tenure at KFM, Defendant Brownfield
6 expressed his dissatisfaction with his compensation package and voiced his
7 displeasure with KFM practices to the local onion growers. In fact, in March 2003,
8 Defendant Brownfield cleaned out his office and told co-workers that he planned
9 on leaving KFM if he was not adequately compensated. As a result, Defendant
10 Brownfield and KFM entered into negotiations regarding Defendant Brownfield's
11 compensation.⁶

12 Grigg and Sons grow onions near Quincy, Washington.⁷ For three years
13 prior to July 11, 2005, as a result of Defendant Brownfield's efforts, KFM was the
14 exclusive marketer of hybrid onions grown by Grigg and Sons. On July 11, 2005,
15 Grigg and Sons terminated their relationship with KFM and shortly thereafter
16 started their own onion marketing firm, Sweet Clover Produce.

17 Prior to this, both KFM and Grigg and Sons profited as a result of their
18
19
20

21 ⁶During the calendar year July 1, 2002-June 30, 2003, Defendant Brownfield
22 received an annual salary of \$97,000.00 and a bonus of \$228,304.41. His total
23 annual compensation was \$354,894.32. During the calendar year July 1, 2003-June
24 30, 2004, Defendant Brownfield received an annual salary of \$175,000.00 and a
25 bonus of \$84,729.00. His total annual compensation was \$296,859.26.

26 ⁷The Griggs' farm lies outside the Walla Walla marketing order.
27 Consequently, Grigg and Sons are prohibited from marketing its sweet onions as
28 Walla Walla sweet onions.

1 business relationship.⁸ KFM had negotiated a lucrative deal between the Griggs
2 and Country Fresh Onion in which Grigg and Son would provide red onions for
3 Wendy's, a fast-food restaurant chain. The Grigg's exclusive Redwing red onion
4 had special attributes that were desirable in the food service industry, including
5 being consistent in its size and color, having a single center, and storing well for up
6 to six months. At the time, there was no other onion farmer growing this type of
7 red onion.

8 In the spring of 2005, Country Fresh Onion was pressing KFM to obtain a
9 signed contract for the 2006 season. Although Defendant Brownfield told Bob
10 Evans that he had obtained a signed contract, no signed contract was ever located.
11 The Griggs testified that they did not sign the contract, but operated under the
12 terms of the contract, nonetheless.

13 Meanwhile, relations between Defendant Brownfield and KFM became
14 strained. Allegations of alcohol use by Brownfield and Tom Barnett, another KFM
15 Walla Walla employee, as well as allegations of other abusive behavior exhibited
16 in the Walla Walla office, were circulating among the customers and growers of
17 KFM. Defendant Brownfield had expressed his concern to the Griggs that KFM
18 was taking away some of its customers as a result of the Duda Alliance.⁹ He told
19 the Griggs that KFM was cancelling deals that Brownfield had put together for the
20

21 ⁸For the period of July 1, 2002 to June 30, 2003, Grigg and Sons' onions
22 sold for \$5,594,305.36; KFM received \$447,549.92 in sales commissions; for the
23 period of July 1, 2003 to June 30, 2004, Grigg and Sons onions sold for
24 \$10,580,309.83; KFM received \$846,350.02 in sales commissions; for the period
25 of July 1, 2004 to June 30, 2005, Grigg and Sons' onions sold for \$3,980,027.46;
26 KFM received \$319,402.20 in sales commissions.

27 ⁹Duda is a competing onion marketing firm. The two firms entered into an
28 alliance to supply sweet onions in the national market.

1 other growers.

2 Things came to a head in October 2004. A series of meetings took place
3 between the management team at KFM and the local onion growers. One meeting
4 was held with Grigg and Sons. Bob Evans, Kurt Schweitzer, and Defendant
5 Brownfield attended, along with Lorin Grigg, Sr. and Lorin Grigg, Jr. Evans and
6 Schweitzer discussed the perceived problems that were being caused by Defendant
7 and Tom Barnett's alcohol use and alleged abusive behavior and also discussed the
8 reorganization that was to take place at the Walla Walla office of KFM. Another
9 meeting took place with other local onion growers, namely the Hamadas and the
10 Locatis. At this meeting, Evans presented a handout of the new company policy
11 that indicated KFM would not tolerate drinking at the Walla Walla KFM office.

12 The Griggs viewed this meeting as a personal attack against Defendant
13 Brownfield. In fact, the local owner growers coined these meetings as the Bill
14 Brownfield Roast. After this meeting, the Griggs discussed opening their own
15 marketing firm with Defendant Brownfield, and in December 2004, the Griggs
16 reinstated their Washington state license to market onions.

17 Plaintiffs assert that after the October 2004 meeting, Defendant Brownfield
18 began to work with the Griggs to establish a competing onion marketing enterprise.
19 Defendant Brownfield denies this. The Court does not find Defendant Brownfield
20 credible and the reason for this begins with Defendant's explanation surrounding
21 the July 9, 2005, email that was sent to Janet Brownfield's home computer from
22 Gail Grigg, Lorin Jr.'s wife.

23 The email was captioned: RE: Hello friend/keystone letter for Bill. In the
24 email, Gail Grigg wrote, in part:

25 Lorin wanted me to forward a copy of the letter I wrote for him,
26 for Bill to read. Here we go, plug your nose and jump in!!! I think
27 Lorin is excited, its just a big move, but he and his dad feel like it is
28 the RIGHT one. Let us know what you guys think of the letter. We
won't be home til late tonight.
Attached to the email was a document named Keystone Fruit Marketing.doc.

1 The document was a letter addressed to Keystone Fruit Marketing, Attn: Bill
2 Brownfield, Bob Evans, Kurt Schweitzer. The letter stated, in part:

3 Upon much consideration, we wish to inform you that we will
4 no longer use Keystone Fruit Marketing as our exclusive sales agent,
effective 7/11/2005.

5 There have been many hours of discussion on this between my
6 father and myself to come up with this decision. We have become
increasingly frustrated in the desire we perceive from your office, to
7 market the hybrid onions. It was our expectation that you were to
market out hybrids with your sweet onions and this alliance would get
8 us into the eastern markets. We have not only felt the hybrids were
more or less "in the way", but have also not capitalized on any
9 increase in profits due to additional sales on the east coast. Also, as
we see it, the alliance Keystone has developed with Duda is allowing
10 them to get connected with existing customers we currently sell our
hybrids to. This will naturally lead to a loss of business for our
11 company, as you have aligned yourself with some of our competitors.
There seems to be some loyalty issues and a conflict of interest for us
12 in our relationship with Keystone, due to these management decisions.
For 2 years now we have been trying to understand or justify this
progression, but we have not reached an understanding or agree with
it at all.

13 Another reason for this decision is that we have decided to form
14 our own marketing sales office, a dream we have had for a number of
years. According to our analysis of our operation, this seems to be the
15 right time for us to start this business venture.

16 Defendant Brownfield insists that he did not see this email at his home. He
17 insists that he knew nothing about the Grigg's decision to start a new marketing
18 firm until he showed up to work on July 11, 2005, and saw an email from Lorin
19 Grigg, Jr. that had attached to it a document named Keystone Fruit Marketing.doc.
20 Janet Brownfield testified that she did not recall giving Gail Grigg's email to her
21 husband, and did not know before seeing Gail's email that the Griggs were
22 considering terminating Keystone and opening their own marketing firm. The
23 Court does not find this testimony credible.¹⁰

24
25 ¹⁰Nor does the Court find credible Janet Brownfield's explanation as to why
26 certain emails were deleted from the computer after getting Plaintiff's request for
27 production of the computer files from Plaintiff. The Court finds that Ms.
28 Brownfield knowingly deleted emails in order to circumvent the discovery request.

1 Rather, the Court finds that Gail Grigg's email clearly indicates that
2 Defendant Brownfield knew prior to July 11, 2005, that the Griggs were planning
3 on establishing a competing onion marketing firm and that Defendant Brownfield
4 had always intended to work for the Griggs once the firm was established. The
5 Court finds the statement "Here we go, plug your nose and jump in!!!" significant.
6 It clearly indicates that the Griggs and the Brownfields had previously discussed
7 the start-up of Sweet Clover Produce and had planned to operate Sweet Clover
8 Produce together. Indeed, a previous email sent from Janet Brownfield to Gail
9 Grigg indicates that "the guys" had a lunch on Friday, July 8, 2005, presumably to
10 discuss sending the termination letter to KFM. Also, the email indicates that the
11 Griggs intended Brownfield to review the letter prior to it being sent to KFM.
12 Defendant Brownfield's testimony that he knew nothing of the letter prior to
13 finding it on his computer on July 11, 2005, is belied by this email.

14 Additionally, the Court finds that Defendant Brownfield took significant
15 steps to assist the Griggs in setting up Sweet Clover Produce. Specifically,
16 Defendant Brownfield made arrangements for Lorin Grigg, Jr. to visit Country
17 Fresh Onions and procured onion seeds on behalf of Grigg and Sons, all without
18 KFM's knowledge and while he was employed at KFM.

19 Circumstantial evidence also indicates that Defendant Brownfield was
20 working with the Griggs prior to July 11, 2005, in order to set up a competing
21 marketing firm. In the spring of 2005, Evans and Schweitzer had talked to the
22 Griggs on the phone regarding the planting of Renegade sweet onions. They also
23 discussed the need for certification of these onions. KFM recommended that the
24 Griggs plant 10 acres as a test plot. Notwithstanding this, the Griggs planted 60
25 acres of Renegade sweet onions.¹¹ KFM had no knowledge of the extra 50 acres of
26 Renegade sweet onions and had not made any arrangements to sell the Renegade
27

28 ¹¹The average sweet onion farm in the Walla Walla area is about 30 acres.

1 sweet onions. It is clear that the Griggs intended to sell these onions in direct
2 competition to KFM and with the help of Defendant Brownfield.

3 Also, by May 2005, Grigg and Sons had 2500 acres of crop in the ground.
4 With respect to hybrid onions, each acre produces between 1,800 and 2,100 50-
5 pound bags of onions. Consequently, at the time the termination letter was sent,
6 Grigg and Sons would have had to sell a very large supply of perishable hybrid
7 onions. The custom of the industry is to pre-sell approximately fifty percent of the
8 onions before the harvest in order to have a reasonable prospect of completing the
9 sale of the entire crop of onions over the course of a season.

10 If what Defendant Brownfield and the Griggs say is true, that is, there was
11 no intention of hiring Brownfield when the Griggs decided to open Sweet Clover
12 Produce, the practical reality would be that Sweet Clover Produce would compete
13 directly against Brownfield in selling their onions, because presumably he would
14 be still be working for Keystone Fruit Marketing. Yet, both Griggs testified that
15 they were comfortable with having Brownfield sell their onions, that Brownfield
16 knew their crop better than anybody else, and that Brownfield was the sole reason
17 that Grigg and Sons came to Keystone Fruit Marketing. It is incredible to believe
18 that the Griggs were planning on directly competing with the same man they hold
19 in such high esteem. It is also incredible to believe that the Griggs would plant
20 2500 acres of onions without first knowing who and how they would sell these
21 onions.

22 In sum, the Court does not find credible Defendant Brownfield's testimony
23 that he did not know the Griggs were going to leave KFM, that he had no intention
24 of working for Sweet Clover prior to being terminated by KFM, and that he took
25 no action to assist the Griggs in planning and implementing Sweet Clover Produce.
26 The Court does not find credible the Griggs' testimony that they had no intention
27 of hiring Brownfield to work for Sweet Clover prior to sending the letter
28 terminating their relationship with KFM. Nor does the Court find credible Lorin

1 Grigg, Jr.'s testimony that if they could not find a salesman to sell the onions, he
 2 would do it himself. Lorin Griggs, Jr. had a full-time job managing Grigg and
 3 Sons and did not have the experience that would permit him to market and sell the
 4 onions.

5 Rather, the Court finds that Defendant Brownfield knew that the Griggs
 6 were interested in starting a competing onion marketing firm as early as November
 7 2004, and took significant steps to assist the Griggs in setting up Sweet Clover
 8 Produce. The Court finds that, contrary to his testimony, Defendant Brownfield
 9 had every intention of leaving KFM as soon as Sweet Clover Produce was up and
 10 running.

11 CONCLUSIONS OF LAW

12 Under Washington law, it is well established that a common law duty of
 13 loyalty exists between an employee and his current employer, even where no
 14 covenant not to compete exists. *Kiebertz & Assoc., Inc. v. Rehn*, 68 Wash. App.
 15 260, 265-66 (1992). "During the period of his employment, an employee is not
 16 'entitled to solicit customers for [a] rival business . . . ' or to act in direct
 17 competition with his or her employer's business. *Id. citing Restatement (Second)*
 18 *of Agency* § 393 *comment e* (1958). In like manner, "[u]nless otherwise agreed, an
 19 agent is subject to a duty not to compete with the principal concerning the subject
 20 matter of his agency." *Id.*

21 *Restatement (Third) of Agency* § 8.01 (2005) provides:

22 An agent has a fiduciary duty to act loyally for the principal's
 23 benefit in all matters connected with the agency relationship.

24 Section 8.11 provides:

25 An agent has a duty to use reasonable effort to provide the
 26 principal with facts that the agent knows, has reason to know, or
 27 should know when . . . the agent knows or has reason to know that the
 28 principal would wish to have the facts or the facts are material to the

1 agent's duties to the principal.¹²

2 Comment *b* to section 8.01 states:

3 An agent's failure to provide material information to the
4 principal may facilitate the agent's breach of the agent's duty of
loyalty to the principal.

5 Comment *d*(2) to section 8.01 states:

6 An agent's breach of fiduciary duty is a basis on which the
7 agent may be required to forfeit commissions and other compensation
paid . . to the agent during the period of the agent's disloyalty.

8 Washington courts look to the Restatements when there is no case law on
9 point. *Kiebertz*, 68 Wash. App. at 265-66.

10 Under Washington law, to recover on a claim of tortious interference with
11 business relations, Plaintiffs have the burden of proving by a preponderance of the
12 evidence each of the following elements: (1) that at the time of the conduct about
13 which Plaintiffs complain, Plaintiffs had a business relationship and expectancy
14 with the probability of future economic benefit with Grigg and Sons to market their
15 onions; (2) that Defendant knew of the existence of that business relationship and
16 expectancy; (3) that Defendant intentionally induced or caused the termination of
17 the business relationship and expectancy; (4) that Defendant's interference was for
18 an improper purpose or by improper means; and (5) that the conduct of Defendant
19 was a proximate cause of damages to Plaintiffs. *Westmark Dev. Corp. v. City of*
20 *Burien*, 140 Wash. App. 540, 557 (2007); Wash. Pattern Jury Instr. 352.02.

21 Interference for improper means is interference that violates a statute, regulation, a
22 recognized rule of common law, or an established standard of the trade or
23 profession. WPI. 352.03.

24
25 ¹²Section 8.11 is a recodification of *Restatement (Second) of Agency* § 381
26 (1958) which states: an agent is subject to a duty to use reasonable efforts to give
27 his principal information which is relevant to affairs entrusted to him and which, as
28 the agent has notice, the principal would desire to have.

1 Plaintiffs presented credible evidence to establish by a preponderance of the
2 evidence that Defendant Brownfield violated his duty of loyalty to KFM and
3 tortiously interfered with the business relationship between KFM and Grigg and
4 Sons.

5 The circumstantial evidence supports a finding that Defendant Brownfield,
6 while being employed at KFM, worked with the Griggs prior to July 11, 2005, to
7 establish a competing business. Defendant Brownfield contacted Country Fresh
8 Produce to set up a meeting with the Griggs, which also coincided with the
9 reinstating of the state license to market onions. Defendant Brownfield attempted
10 to procure seeds for the Griggs, outside the knowledge of KFM. Moreover, the
11 evidence supports a finding that after the October 2004, meeting, Defendant
12 Brownfield was working with the Griggs to start a competing business. In doing
13 so, Defendant Brownfield solicited a KFM customer, Grigg and Sons, for a rival
14 business, Sweet Clover Produce, which acted in direct competition with KFM.

15 Once Defendant Brownfield became aware that Grigg and Sons were
16 contemplating severing their relationship with KFM, Defendant Brownfield had a
17 duty to loyalty to KFM to, at the minimum, notify KFM that Grigg and Sons were
18 thinking about leaving and to assist KFM in its efforts to foster and continue the
19 business relationship. As the evidence shows, Defendant not only failed to notify
20 KFM about any potential problems with Grigg and Sons, but Defendant took
21 positive steps to ensure that the relationship would be irretrievably broken. As an
22 agent of KFM, Defendant had a duty to act in the best interest of KFM and to act
23 with undivided loyalty. The evidence supports a finding that not only did
24 Defendant fail to act in the best interest of KFM, Defendant's loyalty was divided
25 in that he had a significant interest in seeing that Sweet Clover Produce come to
26 fruition even though KFM continued to pay Defendant a significant salary.

27 Likewise, it is undisputed that KFM had a business relationship with Grigg
28 and Sons and had every reason to believe that it would continue to market Grigg

1 and Sons onions for the upcoming growing season. It is also undisputed that, as an
2 employee of KFM, Defendant Brownfield knew of this relationship and
3 expectancy. Also, Defendant's action was by improper means. *See Kieburz*, 68
4 Wash. App. at 267 (holding that establishing a violation the duty of loyalty
5 establishes that the defendant interfered for an improper purpose or used improper
6 means).

7 Plaintiffs have presented credible evidence to establish that Defendant
8 Brownfield's conduct was a proximate cause of damages to Plaintiff. But for
9 Defendant Brownfield assisting in the establishment of Sweet Clover Produce, the
10 Griggs would have continued in their relationship with KFM, especially given that
11 the termination was just prior to the start of the marketing season and the Griggs
12 had a significant number of onions to sell without any means of doing so, absent
13 the cooperation of Defendant Brownfield.¹³

14 **3. Damages**

15 Plaintiffs assert that the proper measure of damages for a breach of the duty
16 of loyalty is the amount of compensation that was paid to Defendant from
17 November 1, 2004 to July 14, 2005. Plaintiffs argue that Defendant Brownfield
18 should be ordered to repay \$145,719.60.¹⁴ Plaintiffs also ask that the Court award
19 them lost profits as a result of Defendant's tortious interference with their business
20

21 ¹³Plaintiffs argue that the Court should apply the substantial factor test in
22 determining whether Plaintiffs have established that Defendant's conduct was a
23 proximate cause of their damages. The Court does not need to reach this argument
24 given that it has concluded that Plaintiffs have shown that but for Defendant's
25 conduct, the Griggs would have continued their business relationship with KFM.

26 ¹⁴Plaintiffs base this figure on the following calculations: \$116,552.93
27 (Defendant's salary from November 1, 2004 to December 31, 2004); \$29,166.67
28 (Defendant's salary from January 1, 2005 to July 14, 2005).

1 relationship.

2 The amount of damages for breach of a duty of loyalty in the employment
3 context is difficult to determine. Under Washington law, the amount of harm is not
4 determinative of the amount of damages. *Cogan v. Kidder, Mathews & Segner,*
5 *Inc.*, 97 Wash.2d 658, 666 (1982) (“Not only does harm not define the scope of
6 fiduciary duty, it also is not determinative of damages.”).

7 The Restatement (Second) of Agency § 469 (1958) provides:

8 An agent is entitled to no compensation for conduct which is
9 disobedient or which is a breach of his duty of loyalty; if such conduct
10 constitutes a willful and deliberate breach of his contract of service, he
is not entitled to compensation even for properly performed services
for which no compensation is apportioned.

11 Washington courts have adopted this section.¹⁵ See *Cogan*, 97 Wash.2d at
12 667. No Washington courts have applied § 469 to an employment context,
13 however, but other states have. See *Phansalkar v. Anderson Weinroth & Co., L.P.*,
14 344 F.3d 184, 199 (2nd Cir. 2003) (New York); *ABC Trans. Nat’l Transp. v.*
15 *Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299, 1315 (1980) (Illinois); *Compass*
16 *Forwarding Co., Inc. v. Prior*, 2004 WL 2375645 (Mass. App. 2004);
17 (Massachusetts); *Production Resource Group, LLC v. Van Hercke*, 2004 WL
18 1445126 (Minn. App. 2004) (Minnesota). Generally, these states do not permit
19 set-off even for properly performed services. But see *Design Strategies, Inc. v.*
20 *Davis*, 469 F.3d 284 (2nd Cir. 2003).¹⁶

22 ¹⁵According to the parallel tables in the Restatement (Third) of Agency,
23 section 469 is now set forth in § 801, Com. d(2) of the Restatement (Third) of
24 Agency.

25 ¹⁶In *Design Strategies, Inc. v. Davis*, the district court for the Southern
26 District of New York ordered that the employee forfeit the salary, but not the
27 commission earned during the period of the breach of loyalty and the Second
28 Circuit affirmed. 469 F.3d 284 (2nd Cir. 2003). The district court reasoned:

1 New Jersey agency law, however, is more restrictive than these states on the
2 issue of salary forfeiture. *See Cameco, Inc. v. Gedicke*, 724 A.2d 783 (N.J. 1999).
3 In that case, the Supreme Court of New Jersey held:

4 the egregiousness of the employee's conduct may affect the
5 employer's right to withhold or recoup the employee's compensation.
6 If the employee directly competes with the employer, aids the
7 employer's direct competitors or those with interests adverse to the
8 employer's interests, participates in a plan to destroy the employer's
9 business, or secretly deprives the employer of an economic
10 opportunity, the employee may forfeit the right to compensation. In
contrast, if the employee's breach is minor, involves only a minimal
amount of time, or does not harm the employer, the employee may be
entitled to all or substantially all of his or her compensation. In
contrast, if the employee's breach is minor, involves only a minimal
amount of time, or does not harm the employer, the employment may
be entitled to all or substantially all of his or her compensation.
Id. at 522.

11 In *Cameco*, a salaried employee, while working for his employer,
12 supplemented his income by establishing a business that, although it did not
13 compete directly with his employer, may have assisted certain of the employer's
14 competitors. *Id.* at 788. Clearly, this is not the case at bar. Rather, here the Court
15 is faced with Defendant's egregious conduct in which Defendant secretly
16 undermined his employer and aided his employer's direct competitor to the
17 detriment of his employer.

18 The Court concludes that the Washington courts would apply the
19 Restatement (Third) of Agency § 801 to the facts of this case and hold that Plaintiff
20 is entitled to the amount of salary that it paid Plaintiff during the period in which
21 he breached his duty of loyalty. *See Kiebertz*, 68 Wash. App. at 265-66
22

23
24 [the employee] must forfeit the salary that he received during
25 the period of disloyalty, but that he is not required to forfeit any
26 commissions because, unlike the defendant in *Phansalkar*, disloyalty
27 did not arise in connection with any Design transaction from which he
was entitled under the terms of his employment agreement to receive a
commission, nor did it "taint[] or interfere[] with the completion" of
any sales in relation to which he received a commission.
Id. at 301.

28 In this case, Defendant did not receive any bonus or commission for 2005.

1 (recognizing that Washington courts have referenced the *Restatement (Second) of*
2 *Agency* in many cases and “it cannot be argued that the *Restatement* is irrelevant to
3 decisions make in this jurisdiction.”). Thus, Defendant will be required to
4 reimburse Plaintiffs for the salary they paid him during the period of disloyalty,
5 which, according to Plaintiff’s evidence, is \$145,719.60.

6 The Court finds that the lost profits from the loss of the Grigg and Sons
7 account to be a reasonable measure of the damages caused by Defendant’s tortious
8 interference of the business relationship. By all means, Plaintiff had a reasonable
9 expectation to sell the onions that were in the ground in May 2005. Plaintiff
10 presented the Court with the amount of commissions received from the Grigg and
11 Sons account for the three years KFM sold Grigg and Sons onions. The Court
12 finds that the average of these three years, \$537,434.05, to be a reasonable estimate
13 of the lost profits that KFM would have received but for Defendant’s tortious
14 interference. The Court awards only one year’s worth of lost profits, however,
15 given the deteriorating relationship between KFM, Defendant Brownfield and the
16 Griggs, and the fact that Defendant Brownfield is not prohibited from working for
17 Sweet Clover Produce after his termination from KFM.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 Plaintiff is to present a proposed judgment consistent with this Order.

20 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
21 Order and forward copies to counsel.

22 **DATED** this 5th day of May, 2008.

23 *S/ Robert H. Whaley*

24 ROBERT H. WHALEY
25 Chief United States District Judge

26 Q:\CIVIL\2005\Keystone Fruit\ffcc2.wpd
27
28